RESPONSE TO COMMENTS ON THE BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT

By letter dated March 1, 2006 the Bad River Band of Lake Superior Tribe of Chippewa Indians (Tribe or Band) submitted an application (hereinafter "Application") for treatment in the same manner as a state (TAS) for purposes of Sections 303 and 401 of the Clean Water Act (CWA). EPA's action today is based on the Application, together with additional supporting documents, which can be found in the Administrative Record. Pursuant to 40 C.F.R. 131.8(c)(2), EPA is required to notify "appropriate governmental entities"[1] of, and provide them an opportunity to comment on, "the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters." Accordingly, on September 1, 2006, EPA provided a copy of the Tribe's Application to the State of Wisconsin (State) with an opportunity to review the Tribe's assertion of authority to identify any competing jurisdictional claims. Thereafter, consistent with EPA's practice, EPA prepared a Proposed Finding of Fact (PFOF) document, which sets forth the facts upon which the Agency may rely in analyzing the Tribe's assertion of inherent Tribal authority over nonmember activities within the Reservation. On February 10. 2009, EPA provided the State an opportunity to review and comment on EPA's PFOF.

Consistent with Agency practice, EPA also provided an opportunity for local governments and the public to review and comment on the Application and PFOF. Notice of the Application was provided to the public through newspaper publication and at a public meeting held on September 21, 2006 at the Ashland High School in Ashland, Wisconsin. The notice requested that all comments be submitted to the State.

Comments were submitted to EPA by the State as follows:

1. By letter dated November 16, 2006, Scott Hassett, Secretary of the Wisconsin Department of Natural Resources, submitted comments on the Tribe's Application.

2. By letter dated March 19, 2009, Todd Ambs, Administrator, Water Division, Wisconsin Department of Natural Resources, transmitted the one comment received from the general public on EPA's proposed findings of fact regarding the Tribe's authority over nonmember activities on fee lands to administer the water quality standards program.

[1] EPA defines "appropriate governmental entities" as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." 56 Fed. Reg. 64876, 64884 (December 12, 1991).

3. By email dated March 19, 2009, Michael Lutz, Attorney, Wisconsin Department of Natural Resources, confirmed that neither the Wisconsin DNR nor the State of Wisconsin will have any comments on the EPA's proposed findings of fact.

EPA's practice is to address all comments received, including those on the Tribe's assertion of authority that are sent directly to EPA from commenters other than appropriate governmental entities. In this Response to Comments document, EPA addresses all comments provided to the Agency regarding both the Tribe's TAS Application and EPA's PFOF.

The document is organized into four sections. The first section responds to the comments received from the State of Wisconsin; the second section responds to comments submitted by the State of Wisconsin on the EPA's PFOF; the third section covers comments from members of the public on both the Band's application and the EPA's PFOF; and the fourth section covers comments in support of the Band's application. Where a comment was raised by both the State and one or more public commenters, a response appears only in the State comment section. Additionally, we have consolidated comments where similar issues were raised.

I. Comments submitted on Tribe's Application by the State of Wisconsin in its letter of November 16, 2006.

State Comment 1: The comment contends that the Tribe has cited off-reservation, upstream dischargers as the source of high fecal coliform and E. coli counts and that these off-reservation dischargers cannot be counted in the Tribe's demonstration of injury under the *Montana* test (*Montana v. United States*, 450 U.S. 544 (1981) (hereafter "*Montana*").

Response: The Decision Document at pages 9-13 fully discusses EPA's approach to analyzing assertions of tribal inherent authority over nonmember activities under the *Montana* test for purposes or regulating water quality on reservations under the CWA. It explains that the *Montana* test remains the relevant standard and that, to meet EPA's formulation of the *Montana* "impacts" test, a tribe needs to show that the actual or potential impacts of nonmember activities on the tribe are "serious and substantial." Moreover, the *Montana*-test discussion notes EPA's long-standing view that "water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government." Decision Document at page10, citing 56 Fed. Reg. at 64879. EPA's approach to tribal inherent authority under CWA Section 518(e) for purposes of the water quality standards (WQS) program has been upheld by the courts. *E.g.*, *Montana v. U.S. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002).

The Decision Document, including the Findings of Fact, explains the basis for EPA's conclusion that the Tribe has demonstrated its inherent authority over nonmember

activities under the *Montana* "impacts" test for purposes of establishing WQS under the CWA.

While the Tribe's Application cites some off-reservation threats to reservation waters, the Application and supplemental materials show serious and substantial impacts or potential impacts from a diverse list of agricultural sources located within the Reservation, which are detailed in the Findings of Fact document. EPA believes that neither the CWA nor case law require a detailed analysis of the Tribe's inherent authority to regulate activities affecting each specific water body within the reservation. In this case, EPA believes that the information provided by the Tribe adequately demonstrates its inherent authority to establish WQS for all water bodies within the Reservation.

State Comment 2: The application fails to show impairment of reservation waters from non-member agricultural practices on the southern end of the reservation with the exception of a "single beef farm on a tributary to the Marengo River." Therefore, because reservation waters are generally of high quality, the impairment resulting from the beef farm is insufficient to demonstrate injury under the *Montana* test.

Response: See Response to State Comment 1 above. The Tribe has made a showing of facts that there are surface waters within the Reservation used by the Tribe or its members (and thus that the Tribe or its members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters of the Reservation are resources subject to protection under the CWA. The Tribe has also shown that impairment of reservation water bodies by the activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial. EPA believes that the information provided by the Tribe adequately demonstrates its inherent authority to establish WQS for all water bodies within the Reservation. Further, the State has not disputed the Tribe's authority over water bodies in general or any particular water body.

State comment 3: The application identifies failing septic tanks as a source of potential impairment of reservation waters but fails to document whether these septic systems are owned by non-members.

Response: See Response to State Comment 1 above. As further detailed in the Findings of Fact Document, the Tribe's Application shows that there are 166 private septic systems on the Reservation, including at least 27 non-tribal septic systems; 12 septic systems in the predominantly non-member owned Amnicon Bay Subdivision; and 40 nonmember owned cabins in the Kakagon Sloughs. Based on the Tribe's investigations, some of these nonmember owned cabins have outhouses over open water and in some cases the outhouses were submerged in water. EPA believes that the facts established by the Band are sufficient to demonstrate that impairment of reservation water bodies by these septic-related activities of nonmembers on lands within the Reservation has or may

have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial.

State comment 4: The forestry impacts included in the application are speculative and lack sufficient information to demonstrate any resulting impairment of water.

Response: See Response to State Comment 1 above. As further detailed in the Findings of Fact Document, the Tribe's Application shows that forestry practices are one of the largest threats to reservation waters because of area logging. Ashland County issues logging permits for private lands within the reservation boundaries. The Band has attempted to halt clear cutting practices which may adversely impact river ecosystems, and has attempted to require loggers to employ best management practices. Additionally, impacts associated with logging road construction has been documented on the reservation. EPA believes that the facts established by the Band are sufficient to demonstrate that impairment of reservation water bodies by these logging-related activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial.

State comment 5: The illegal dumping described in the application does not specify that illegal dumping has been caused by non-members or that it has caused any impairment of water.

Response: See Response to State Comment 1 above. As further detailed in the Findings of Fact Document, the Tribe's Application shows that nontribal members have been linked to both illegal dumping and unpermitted salvage yards located on the reservation. The Application shows that many of these unpermitted sites are located in close proximity to streams or where they come in contact with stormwater flowing into reservation waters. EPA believes that the facts established by the Band are sufficient to demonstrate that impairment of reservation water bodies by these unpermitted dumps and salvage yards on lands within the Reservation have or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial.

State comment 6: There are no open pit mines on the reservation, nor is there any mine proposed on the reservation, so there is no demonstrable effect of such a mine under the *Montana* test.

Response: See Response to State Comment 1 above. As further detailed in the Findings of Fact document, the Tribe's application shows that there is a potential for sand and gravel mining on the reservation, based on historical use of land within the reservation and reservation geology. The Decision Document at pages 9-13 fully discusses EPA's approach to analyzing assertions of tribal inherent authority over nonmember activities under the *Montana* test for purposes or regulating water quality on reservations under the CWA. It explains that the *Montana* test remains the relevant standard and that, to meet EPA's formulation of the *Montana* "impacts" test, a tribe needs to show that the actual *or*

potential impacts of nonmember activities on the tribe are "serious and substantial" [emphasis added]. Therefore, it is not necessary for the Tribe to demonstrate that there is active mining occurring on the reservation, but rather EPA believes it is sufficient for purposes of establishing jurisdiction under Section 518 of the CWA, for the Tribe to show that there is a potential for this type of activity on the reservation. EPA believes the Tribe has made this demonstration in this case.

State Comment 7: The State feels that the EPA should seriously consider the adequacy of existing state and local regulation of nonmember activities on private property both within the reservation boundaries and upstream outside the reservation boundaries.

Response: Currently, there are no federally-approved WQS for the Bad River Reservation. The State's CWA WQS do not apply to waters in Indian country within the State of Wisconsin, including the Bad River Reservation. If approved by EPA, the Tribe's standards would be the applicable WQS for the Reservation for purposes of the CWA. Pursuant to CWA Section 518(e), EPA has promulgated procedures for resolving any disputes which may occur between states and tribes arising as a result of differing WQS on common bodies of water. 40 C.F.R. 131.7. Hence, EPA does not anticipate any difficulties in implementation of the State's and Tribe's respective WQS programs under the CWA.

State Comment 8: EPA's analysis of the *Montana* test factors should include an analysis of whether the State's asserted sovereignty over waters is so broad as to preclude a tribe from showing that it has the jurisdiction required under the *Montana* test, and, moreover, that the Tribe should demonstrate that the State has "abdicated or abused" its regulatory authority in such a way as to harm tribal members as part of a demonstration the Tribe must make pursuant to the *Montana* test. (citing *Lower Brule Sioux Tribe v. South Dakota*, 917 F. Supp. 1434, 1457 (D.S.D. 1996)).

Response: See Response to State Comments 1 and 7 above. Regulation of water quality under the Clean Water Act (33 U.S.C. § 1251 et. seq.) is predicated upon the United States' authority under the Commerce Clause of the United States Constitution. Congress, pursuant to that authority, has provided that states and tribes may carry out certain functions under the Act. Setting water quality standards by the Tribe is one of those functions so authorized provided that the Tribe meets the requisite statutory and regulatory criteria. EPA has found the Band meets the requirements of the Act in its Decision Document and supporting documentation.

The State's position that the Tribe should demonstrate that State regulations "abdicate or abuse" state authority in such a way as to harm tribal members before the Band should be allowed to set water quality standards is not the applicable standard under existing case law. *Montana v. United States,* 450 U.S. 544, requires, among other things, that a tribe demonstrate that nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

EPA previously established by rulemaking that "activities which affect surface water and critical habitat quality may have serious and substantial impacts[,]" and those impacts meet the applicable legal standards to allow the Band to set water quality standards in this case. *Lower Brule Sioux Tribe v. South Dakota,* cited by the State, recognizes *Montana* and its standards as the applicable legal test. Wisconsin's federally-approved water quality standards program does not apply within the boundaries of the Bad River Reservation, and therefore there are no existing federally approved water quality standards yet applicable on the Reservation, either as applied to non-members or Tribal members Please see EPA's Decision Document for an elaboration of the standards as applied to the Band's application.

State Comment 9: Under the so-called "Equal Footing Doctrine", Wisconsin obtained authority over navigable waters and holds these waters in trust for the public, citing Wisconsin v. Baker, 698 F. 2d 1323, 1326-1327 (7th Cir.1983).

Response: Pursuant to the CWA's Section 518, a tribe may demonstrate jurisdiction over water resources where:

> [T]he functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation. . . .

33 U.S.C. § 1377(e)(2), CWA Section § 518(e)(2). In the preamble to its 1991 rule, the Agency explained that "EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation if the Tribe can demonstrate the requisite authority over such water resources." *Id.* at 64881-82. The argument that the waters of the State are held in public trust, and the related argument that title to the beds, submerged lands, and/or navigable waters inheres in the state of Wisconsin, are not relevant to the issue of tribal regulatory authority for purposes of Section 518 of the CWA, where the waters are "within" the boundaries of a federally-recognized Indian tribe's reservation and the tribe, as here, has demonstrated regulatory jurisdiction over those waters.

This position was expressly affirmed by the Seventh Circuit Court of Appeals in its decision in *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002), in which the court upheld EPA's decision to grant TAS eligibility for CWA Sections 303 and 401 to the Sokaogon Chippewa (Mole Lake) Band over objections made by the State on Equal Footing grounds. There, the Seventh Circuit found "It was reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water, and we uphold that determination." *Id.* at 747. This authority stems from Congress's plenary power over navigable waters under the Commerce Clause, which, the Seventh Circuit found, "has not been eroded in any way by the Equal Footing Doctrine cases." *Id.* at 747.

State Comment 10: The Tribe asserts in its TAS application that § 518 of the CWA constitutes a delegation of federal authority from Congress to tribes to regulate navigable waters within their reservations. The State notes that EPA has not interpreted the CWA as a delegation.

Response: EPA's decision today does not rely upon an argument that the Section 518 of the CWA constitutes a delegation of authority to Tribes. See also response to State comments 1 and 9 above.

State Comment 11: None of the reservation activities cited by the Tribe are required to comply with a water quality standard.

Response: See Response to State comment 1 above. While EPA considers a variety of activities in assessing the impacts of non-member activities on a tribe under *Montana*, TAS authorization in today's action is limited to Sections 303 and 401 of the CWA.

State Comment 12: The State does not interpret the Tribe's application to apply to any water considered to be part of Lake Superior and would object to any holding to the contrary as the reservation boundaries in all instances end at or before the waters of Lake Superior.

Response: As explained within the Decision Document, the Tribe's Application seeks authority to set water quality standards for waters within the boundaries of its Reservation. The Tribe does not seek authority in this application to set WQS for Lake Superior. Should the Tribe seek to expand the area within which it asserts the authority to set WQS in the future, the Tribe will have to submit an application to EPA for evaluation in accordance with EPA's regulations and procedures for evaluating and processing TAS determinations. That process includes opportunities for public notice and comment.

II. State Comments Submitted on EPA's Proposed Findings of Fact by the State of Wisconsin

None.

III. Comments submitted by the Public Not Previously Addressed Regarding Both the Application and EPA's Proposed Findings of Fact

Public Comment 1: One commenter objected to the Tribe's assertion of authority to set water quality standards on the basis of a fear that such authority would hinder economic development surrounding the reservation.

Response: The TAS eligibility criteria in Section 518(e) of the CWA and EPA's implementing regulations do not provide for EPA to consider the economic implications of a TAS application on third parties. However, when EPA makes a decision on tribal

regulatory program authority (as opposed to a TAS decision), EPA can take economic factors into account to the same extent they are considered for decisions on state programs. For tribes that have received approval for TAS for WQS, economic and social implications may be considered at the time standards are adopted and implemented in accordance with applicable regulations. For example, EPA's regulations provide that in revising its WQS, a state or authorized tribe may remove a designated use under certain circumstances by demonstrating that attaining the use is not feasible because controls to meet the use "would result in substantial and widespread economic and social impact." 40 C.F.R. 131.10(g)(6). In such cases, the state or authorized tribe, and EPA, could consider economic impacts generally. EPA has issued guidance for implementing this provision of the regulations: Interim Economic Guidance for Water Quality Standards, March 1995, available at http://www.epa.gov/waterscience/standards/econworkbook/, which provides further information.

The Tribe's TAS status and subsequent EPA approval of its WQS are not expected to adversely affect property values or tax revenues from property taxes assessed by local governments. Instead, Tribal standards that protect water quality within the Bad River Reservation will serve to preserve and protect surrounding property values and the tax base. The Tribe has substantial investments in the region's business community. Those investments have helped make the region a more attractive place to live and recreate, which benefits regional property values and the local and state tax bases. There is no basis to expect that the Tribe would use its TAS authority to undermine its substantial investments in the economy and the natural resources that sustain it.

Public Comment 2: Some commenters felt that granting CWA 303 and 401 authority to the Tribe would result in the Tribe taking action to restrict use of water or property adjacent to waters of the Band

Response: EPA's action today is solely to find the Tribe is eligible under Section 518(e) of the CWA to carry out the Section 303 and 401 programs. EPA is not today approving the Band's WQS under Section 303, nor any regulatory programs the Band may have adopted for environmental protection or other purposes. A tribe with TAS for WQS must still develop WQS, submit them to EPA, and obtain federal approval of the WQS before the standards can become effective under the CWA.

Public Comment 3: One commenter felt that granting CWA 303 and 401 authority to the Tribe would enable the Tribe to require discharge permits for use of outboard motors, including in navigable waters.

See response to Public Comment 2 above.

Public Comment 4: One commenter asserted that the Tribe has failed to demonstrate capability to implement a WQS program because they did not address a deteriorating/sinking tribal gill net boat next to the Highway 2 Bridge.

Response: EPA's regulations specify that in determining capability, the Tribe should provide a description of its previous management experience, a list of existing public health and environmental programs managed by the tribe, a description of the existing or proposed agency of the tribe that will administer the WQS program, a description of the technical and administrative capabilities of the tribe's staff, as well as any additional information the Agency might request. The record includes the information the Tribe submitted to fulfill these requirements, and EPA's Decision Document provides a detailed discussion of how the Tribe has demonstrated its capability to implement the authority it is seeking for CWA sections 303 and 401.

Public Comment 5: Some commenters assert that the Tribe may seek to set WQS so stringent that no one will be able to comply with them, and that these WQS will be unfairly applied only to non-members.

Response: See response to Public Comment 2 above. As stated above, a tribe with TAS for WQS must still develop WQS, submit them to EPA, and obtain federal approval of the WQS before the standards can become effective under the CWA. The WQS approval process includes the opportunity for public notice and comment. EPA expects the Band to implement any federally approved WQS consistent with federal requirements. National Pollutant Discharge Elimination System (NPDES) permitting under the CWA is addressed in Section 402, and the Tribe is not applying for authorization under that section; EPA remains the NPDES permitting authority for all on-reservation dischargers under the CWA.

Public Comment 6: One commenter expressed concern that authorization of the Tribe for CWA 303 and 401 will infringe upon public access to navigable waters and boat landings.

Response; See response to State Comment 9 above.

Public Comment 7: One commenter asserted that iron mining, because it would be regulated by state and federal permit programs, could not present a potential or actual threat to reservation waters. The commenter notes that iron mine pits have been used as drinking water sources and recreational areas.

Response: See Response to State Comments 6 and 7 above. In its July 23, 2008 letter to the Regional Administrator, the Tribe wrote that iron deposits are located within the area of the reservation and while currently the Tribe "does not see [an iron] mine as a threat to the Tribe's water quality . . . . efforts were made to ensure mining was included in the comprehensive planning of the towns and counties, raising the possibility of mining as a potential harm. (p. 18).

Public Comment 8: One commenter requested information regarding how Reservation waters are currently governed and asked why it is necessary for the Tribe to set their own WQS when they might utilize zoning authorities.

Response: See response to State Comment 7 above. The Tribe's authority to set federally recognized WQS is a federal authorization under the CWA. This authority is separate from tribal zoning authorities, which are not federally authorized or established.

Public Comment 9: One commenter asserts that the Band has disregarded individual rights and acted in an arbitrary and capricious manner and is therefore incapable of fairly implementing federally authorized WQS.

Response: See Response to Public Comment 2 and 5 above. EPA expects the Band to implement any federally approved WQS consistent with federal requirements. EPA has received no evidence that the Band has disregarded individual rights or acted in an arbitrary and capricious manner.

IV. Comments in Support of the Application

Letters supporting the Tribe's application came from individuals, local governments, environmental groups, a Tribal government, and a petition with over 75 signatures from people within the Ashland, WI area. These letters of support have been added to the Administrative Record for this decision.